local number portability. Sprint argued Consolidated should not be allowed to levy an additional charge to recover its cost of LNP beyond what it has already been approved to recover.[188]

**Consolidated's Position**

Consolidated claimed that the Party's should be allowed to charge a service order charge for an LSR because it is an administrative cost incurred by Consolidated that is caused by Sprint. Consolidated claimed the charge is a standard part of its interconnection agreements, and argued that the cost causer should be charged for the services being rendered. Consolidated claimed Sprint's proposal that Sprint will not charge Consolidated does not make sense and Sprint's forbearance does not justify imposing the same approach on Consolidated as Sprint is the party that will be placing most of the LSR orders, at least in the short term. Consolidated stated there is no "double dipping" by Consolidated charging Sprint a non-recurring charge for processing Sprint's LSRs simply because it recovers its cost for LNP.[189] Consolidated claims an LSR of $15.03 is justified and the amount is a reasonable approximation of its costs for performing the LSR function.[190]

**Arbitrators' Decision**

The Arbitrators note at the outset that they believe that each Party is entitled to impose a "just and reasonable" charge to the other Party for porting a customer to that Party, so long as that charge is based on the actual, forward-looking cost of performing the function and is nondiscriminatory.[191] The Arbitrator's agree in principle with Consolidated's witness Shultz that the "cost-causer" should bear the costs of LSRs.[192]

However, the Arbitrators must also take note of Sprint's observation that Consolidated has failed to enter, or even attempt to enter, a TELRIC cost study or any documentation or testimony of any kind into evidence in this proceeding that supports an LSR charge of $15.03 or

---

[188] Direct Testimony of James R. Burt, Sprint Ex. 1 at 44.

[189] Direct Testimony of Michael Shultz, Consolidated Ex. 3 at 30-31.

[190] Direct Testimony of Michael Shultz, Consolidated Ex. 3 at 43.

[191] 47 U.S.C. 252(d); *See also* Docket No. 24547, *Arbitration for Interconnection between 1-800-4-A-Phone and Southwestern Bell Telephone Company*, Arbitration Award at 8 and 10 (Jan. 25, 2002) where the Commission notes that OSS functions are UNEs and that prices for UNEs should be based on TELRIC; *accord Southwestern Bell Telephone Company v. AT&T Communications of the Southwest, Inc.*, 1998 WL 657717 at 4 (W.D. Texas, 1998).

any other amount.[193] Thus no evidence exists in the record to inform the Arbitrators on the issue of whether an LSR of $15.03 is just, reasonable, forward-looking, or cost-based. Consolidated argued in its post-hearing brief that Consolidated's witness Shultz "...specifically discusses the LSR charge, the cost supporting it, and why it must be assessed."[194] The Arbitrators carefully reviewed Shultz's cited testimony and find nothing in the record that could be construed to reveal with any level of certainty Consolidated's cost of performing an LSR.

Consolidated also argued in its post-hearing brief that Consolidated has tariffs on file with the Commission for Consolidated's Texas ILECs showing an LSR charge that is comparable to the LSR charge that Consolidated asks the Arbitrators to impose in this proceeding. Consolidated argued that the Arbitrators can take judicial notice of the fact of the tariffs and implied that the Arbitrators can invoke judicial notice to find justification to adopt the requested LSR.[195] Consolidated argued that sufficient information must have been provided to the Commission to support the referenced tariffs, or the Commission would never have approved the tariffs.[196]

The Arbitrators disagree as a threshold matter that a tariff on file at the Commission may serve as a sufficient basis to substitute for a TELRIC study, and note that Consolidated has offered no authority to support its contention that it can or should. In any event, the Arbitrators decline to take judicial notice of the referenced tariffs at this stage of these proceedings. The Arbitrators note that P.U.C SUBST. R. 21.95(i) indicates that "[t]he Texas Rules of Civil Procedure, Texas Rules of Civil Evidence, Texas Administrative Procedure Act §2001.081, and Chapter 22 of this title (relating to Practice and Procedure) may be used as guidance in proceedings under this chapter."[197] The Arbitrators further note that P.U.C. SUBST. R. 21.95(m) indicates that the "...presiding officer shall provide notice of his decision on whether or not to apply strict rules of evidence (or any other rules) as to the admissibility, relevance, or weight of

---

[192] Shultz Direct at 30-31.

[193] Sprint's Post-hearing Brief at 31. (November 10, 2006).

[194] Consolidated's Post-hearing Brief at 33 (November 10, 2006).

[195] Consolidated's Post-hearing Brief at 33-34.

[196] Consolidated's Post-hearing Brief at 33-34.

[197] P.U.C. SUBST. R. 21.95(i).

any material tendered by a party on any matter of fact or expert opinion."[198] The Arbitrators did not indicate to the Parties prior to the deadline for filing direct testimony that the rules of evidence would be strictly applied in these proceedings, so the Arbitrators have conducted these proceedings without resort to requiring strict adherence to Texas evidentiary rules in regard to matters of admissibility, relevance or weight. Even so, the Arbitrators must be informed by the Texas Rules of Evidence in the conduct of these proceedings and ensure that such rules are applied fairly, even while being construed liberally.

While TEX. R. EVID. 201, "Judicial Notice of Adjudicative Facts" subsection (c) indicates that a court may take judicial notice of a fact "...whether requested or not...," subsection (e) indicates the opposing party "...is entitled upon timely request to an opportunity to be heard as the propriety of taking judicial notice and the tenor of the matter noticed."[199] The Arbitrators note that Consolidated did not, during the course of the hearing in this arbitration, make any request for the Arbitrators to take judicial notice of Consolidated's tariffs for Consolidated's Texas ILECs. The first time the issue was raised was in Consolidated's post-hearing brief,[200] and even there Consolidated did not ask the Arbitrators to take judicial notice of the tariffs, but merely noted that the "...Commission can take judicial notice..." of the tariffs. As mentioned previously, Consolidated cites no authority in support of the proposition that the referenced tariff may suffice as a replacement for a cost study supporting an LSR charge, or that a tariff may suffice as a replacement for a cost study in any relevant context. Because Consolidated did not move the Arbitrators to take judicial notice of the referenced tariffs during the course of the pre-hearing or the hearing in this case, Sprint had no opportunity to be heard on the matter.

Consolidated has offered no reason why it failed to enter evidence in this case regarding the requested LSR charge, and Consolidated has offered no reason why it waited until after the hearing on the merits to point out that the Arbitrators can take judicial notice of the referenced tariffs. Because Sprint would be denied an opportunity to be heard on the matter if the Arbitrators take judicial notice of the referenced tariffs at this time, and because no authority has been cited in support of the proposition that the referenced tariffs may suffice as a substitute for a

---

[198] P.U.C. SUBST. R. 21.95(m).

[199] TEX. R. EVID. 201(c) and (e).

cost study in support of the requested LSR charge, the Arbitrators decline to take judicial notice of the referenced tariffs for the purpose of establishing an appropriate LSR rate. Even though the Arbitrators believe that a cost-based LSR is appropriate under the circumstances of this arbitration, the Arbitrators find the evidentiary record in this proceeding wholly inadequate to support the LSR rate requested by Consolidated.

Sprint urged the Arbitrators to adopt an LSR of no more than $1.25 per port, a charge that Sprint contends is consistent with the safe-harbor charge that the FCC adopted for an electronic PIC-change.[201] Sprint witness Burt did make reference to the fact in his direct testimony that Sprint had requested a relevant cost study from Consolidated, but that Consolidated had provided only a one-page report that was, in Sprint's estimation, inadequate for the purpose of determining the reasonableness of the proposed charge.[202] The Arbitrators note that Consolidated did provide the one-page cost information to Sprint in response to a Sprint RFI, but did not enter the one-page cost information into the record evidence in this arbitration. The Arbitrators note that Sprint did make reference in its direct testimony to service order rates from other cases that evidently Sprint believes to be sufficiently analogous to this case that the Arbitrators may adopt those rates as appropriate here.[203] However, the Arbitrators note that Sprint has introduced no cost study of its own that would, in the Arbitrators view, support the adoption of a cost-based LSR in this case.

The Arbitrators are not free to invent an LSR charge that they believe is fair or equitable without regard to the pertinent evidentiary record, or lack thereof, in this proceeding. While the Arbitrators believe that an LSR charge is appropriate under the facts of this arbitration, the Arbitrators simply have no evidence on which to based an LSR that is just, reasonable, forward-looking, or cost-based. However, the Arbitrators are persuaded that adopting an LSR charge of zero in this arbitration is not appropriate because the "cost-causer" party would not bear the cost of LSRs under such an arrangement. The Arbitrators conclude that the appropriate LSR charge

---

[200] Consolidated's Post-hearing Brief at 33.

[201] Direct Testimony of James R. Burt, Sprint Ex. 1 at 44; *see also Presubscribed Interexchange Carrier Charges*, WC Docket No. 02-53, Report and Order, FCC 05-32 (rel. Feb. 17, 2005)(*"PIC Change Charge Order"*).

[202] Direct Testimony of James R. Burt, Sprint Ex. 1 at 45.

[203] Direct Testimony of James R. Burt, Sprint Ex. 1 at 45-46.

must be based on the actual, forward-looking cost of performing the function. As mentioned above, the Arbitrators do not have the benefit of evidentiary support for adopting such an actual, forward-looking LSR cost. Therefore, the Arbitrators adopt the following text for Attachment 8, Section 2.5 so that each party has an opportunity to conduct an appropriate cost study for LSRs under this Agreement and obtain Commission approval for its inclusion in the Agreement:

> **2.5 ILEC and CLEC shall each be entitled to collect a non-recurring service order charge for each Local Service Request ("LSR") submitted to the other Party. The LSR shall initially be $0.00. However, the ILEC may at any time subsequent to the Commission's approval of the Parties' Interconnection Agreement, submit a TELRIC-based LSR cost study that reflects its cost of performing an LSR to the Commission for approval. On the Commission's approval of such cost study, each Party shall be entitled to charge the other Party the Commission-approved charge for LSRs. The ILEC shall be entitled to submit such LSR cost study for Commission approval only once during the initial term of this Agreement. The ILEC shall submit such LSR cost study under Docket No. 31577, and the ILEC shall provide CLEC of notice of such filing and CLEC shall have the opportunity to file a response within twenty (20) calendar days. On the Commission's approval of the ILEC's LSR cost study, the Parties shall file jointly submit, for the Commission's approval, an amendment to this Interconnection Agreement that reflects the Commission-approved LSR charge.**

The charge reflected in Attachment 7, Exhibit A shall be conformed to reflect the appropriate LSR charge in effect pursuant to the language of Attachment 8, Section 2.5 as set out above.

## Sprint and Consolidated Issue 11

***Sprint - Definitions of IP-PSTN, Responsible Party, Sprint-TWC Arrangement, Unclassified Traffic?***

***Consolidated -Should these definitions be included in the agreement?***

**Sprint's Position**

Sprint noted that this issue is a disagreement between the Parties regarding several definitions that are contained or used in Attachment No. 10, and that the inclusion of Attachment No. 10 is disputed as Issue No. 4. Thus, Sprint argued that the resolution of this issue should be tied to Issue No. 4. Sprint acknowledged the disputed definitions include IP-PSTN, Responsible Party, Sprint-TWC Agreement, and Unclassified Traffic. Sprint argues that the terms are not necessary and need not be included in the agreement. However, Sprint also noted that should the

Commission agree with Sprint on Issue 4 that Attachment No. 10 is not necessary for the exchange of traffic between the Parties, Issue 11 should be decided in favor of Sprint.[204]

**Consolidated's Position**

Consolidated claimed the definitions of (1) IP-PSTN Termination Traffic, (2) Responsible Party, (3) Sprint-TWC Arrangement and (4) Unclassified Traffic are important definitions that should be included in the interconnection agreement and be a clear as possible.[205]

**Arbitrators' Decision**

A. The Arbitrators adopt Consolidated's definitions of: IP-PSTN Termination Traffic, Responsible Party, and Unclassified Traffic, as described below:

> "IP-PSTN Termination Traffic" - means traffic of last-mile provider scriber provided by CLEC for termination to ILEC's network. (Attachment 5, Definitions.)
>
> "Responsible Party" - The Party responsible for IP-PSTN Termination Traffic for purposes of 3.1 above (the "Responsible Party") is the Party converting traffic from IP to PSTN for termination to the PSTN network or converting PSTN traffic to IP for termination through the authorized last-mile provider as VoIP traffic. CLEC is the Responsible Party with respect to traffic originated by or terminated to CLEC for the Sprint/last-mile provider Arrangement. (Attachment 10, Section 3.2)
>
> "Unclassified Traffic"- The Parties acknowledge that certain IP-PSTN Traffic, due to the technical nature of its origination may be properly transmitted without all Traffic identifiers. In such instances, the Parties agree that such IP-PSTN Termination Traffic shall be considered "Unclassified Traffic" if the traffic can be affirmatively demonstrated to be missing Traffic Identifiers by means other than the Traffic Identifiers being stripped, altered, modified, added, deleted, changed, and/or incorrectly assigned. Otherwise the traffic shall be considered "Misclassified Traffic" as described below. (Attachment No. 10, Section 6.1)

B. The Arbitrators adopt Sprint's proposed definition of Sprint/TWC (Sprint/Last Mile Provider) Arrangement described in 1.5 of the Interconnection Agreement, as follows:

> 1.5 CLEC represents that it has or may enter into business arrangements with last-mile providers regarding traffic to be exchanged in accordance with this agreement. CLEC will be financially responsible for all traffic sent to ILEC.

---

[204] Direct Testimony of James R. Burt, Sprint Ex. 1 at 46-47.

[205] Direct Testimony of Michael Shultz, Consolidated Ex. 3 at 31.

## V. CONCLUSION AND IMPLEMENTATION SCHEDULE

The Arbitrators conclude that the decisions outlined in this Award, as well as the conditions imposed on the Parties by these decisions, meet the requirements of FTA § 251 and any applicable regulations prescribed by the FCC pursuant to FTA § 251. The Arbitrators note that Docket Nos. 31577 and 31578 were consolidated on October 5, 2006, for the ease of administration, and that the decisions outlined in this Award apply to Sprint's petition for compulsory arbitration to establish interconnection terms and conditions with each Consolidated Communications of Fort Bend Company (Docket No. 31577) and Consolidated Communications of Texas Company (Docket No. 31578). Unless the parties agree to a later date, the Arbitrators order that this Interconnection Agreement be fully implemented by no later than March 1, 2007. "Fully implemented" means all provisioning and testing is completed and the parties have the ability to exchange traffic.

**SIGNED AT AUSTIN, TEXAS on the 19 day of DECEMBER, 2006.**

**FTA § 252 PANEL**

For Larry H Barnes
**MARK HALLMARK, ARBITRATOR**

Larry H Barnes
**LARRY BARNES, ARBITRATOR**

# EXHIBIT E

**PUC DOCKET NO. 24547**

02 JAN 28 PM 3:09

FILING CLERK

| | | |
|---|---|---|
| **ARBITRATION FOR INTERCONNECTION BETWEEN 1-800-4-A-PHONE AND SOUTHWESTERN BELL TELEPHONE COMPANY** | § § § § § § § | **PUBLIC UTILITY COMMISSION OF TEXAS** |

# ARBITRATION AWARD

## Table of Contents



60

**PUC DOCKET NO 24542**

| | | |
|---|---|---|
| **ARBITRATION FOR INTERCONNECTION BETWEEN 1-800-4-A-PHONE AND SOUTHWESTERN BELL TELEPHONE COMPANY** | § § § § § § § | **PUBLIC UTILITY COMMISSION OF TEXAS** |

# ARBITRATION AWARD

This Arbitration Award (Award) establishes the amount that Southwestern Bell Telephone Company of Texas (SWBT) shall charge AccuTel of Texas, Inc., dba 1-800-4-A-PHONE (AccuTel) for the processing of electronic orders of resold services for new and suspended customers. The parties' final Decision Point List (DPL) (Attachment 1 hereto), divided the single issue of the appropriate pricing of these orders into six separate DPL issues. To avoid undue confusion and duplication of analysis, the Arbitrators' decision relating to the pricing issue is provided under DPL Issue 7. The Arbitrators' decision on DPL Issue 6 addresses what is in essence a threshold jurisdictional issue.

SWBT and AccuTel, having initiated the arbitration of the issue of the appropriate pricing of these electronic orders in this proceeding pursuant to § 252 of the Federal Telecommunications Act of 1996,[1] shall incorporate the charges approved in this Award in their interconnection agreement.

## I. JURISDICTION

If an incumbent local exchange carrier (ILEC), in this case SWBT, and the competitive local exchange carrier (CLEC), in this case AccuTel, cannot successfully negotiate rates, terms, and conditions in an interconnection agreement, FTA § 252(b)(1) provides that either of the negotiating parties "may petition a State commission to arbitrate any open issues." The

---

[1] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 15 and 47 U.S.C.) (FTA).

Commission is a state regulatory body responsible for arbitrating interconnection agreements approved pursuant to the FTA.

## II. Procedural History

This arbitration was preceded by a complaint and request for expedited ruling against SWBT, filed by AccuTel on February 21, 2001, pursuant to P.U.C. Proc. R. 22.326.[2] In its complaint, AccuTel alleged that SWBT had implemented anti-competitive changes to its service-ordering system, and that SWBT's rates and charges for electronic service ordering unreasonably discriminate against certificated telecommunications utilities (CTUs) that purchase services for resale. On March 28, 2001, the complaint docket (Docket No. 23721) was abated to provide the parties an opportunity to resolve their issues through the mediation proceedings in the Commission's informal dispute resolution docket.[3] The parties resolved some of their issues informally, but did not settle a key pricing dispute. Consequently, AccuTel filed its petition for arbitration in this docket on August 22, 2001. On August 27, 2001, SWBT filed a motion to dismiss AccuTel's petition for arbitration. At the August 28, 2001 prehearing conference, the parties were directed to file briefs on whether the issue brought by AccuTel would be appropriately raised as a compulsory arbitration under the FTA, as a post-interconnection dispute under Commission rules, as both, or as neither. At the September 10, 2001 prehearing conference, however, the parties informed the Arbitrators that they had agreed to dismiss the post-interconnection complaint case and proceed with the petition for arbitration.[4] Following AccuTel's filing of a motion to dismiss the complaint case, SWBT withdrew its motion to dismiss AccuTel's petition for arbitration. Accordingly, the Commission dismissed the complaint case and proceeded with this docket.[5]

Another prehearing conference was held on September 17, 2001, at which the parties announced that they had agreed that the start date for negotiations was April 25, 2001; therefore,

---

[2] *Complaint of AccuTel of Texas, Inc. Against Southwestern Bell Telephone Company and for Resolution of Dispute*, Docket No. 23721 (Feb. 21, 2001).

[3] *Informal Dispute Resolution for Issues Relating to Operational Support Systems*, Docket No. 21000.

[4] Prehearing Conference Tr. at 5-7 (Sept. 10, 2001).

the window for requesting arbitration extended from September 7, 2001 through October 2, 2001.[6] Pursuant to AccuTel's request, SWBT also agreed to file by October 9, 2001 an avoided-cost study relating to the electronic processing of new-customer orders submitted by a CLEC. Additionally, SWBT agreed that a deposition by AccuTel of the cost study's author would take place on October 11, 2001.

AccuTel and SWBT, the only parties in this proceeding, engaged in discovery into November 2001. At a prehearing conference on November 16, 2001, the Arbitrators issued rulings on certain outstanding discovery issues. Although SWBT filed a motion for reconsideration of the Arbitrators' ruling requiring SWBT to produce certain cost studies, SWBT and AccuTel agreed on a compromise arrangement that resolved their discovery dispute. As part of this arrangement, the parties agreed to submit a joint DPL containing seven issues. DPL Issue 7 was added to the previously submitted DPL by AccuTel.[7]

The parties filed direct testimony on October 31, 2001, and filed rebuttal testimony on November 13, 2001. The hearing on the merits was held on November 28, 2001. The parties filed initial briefs on December 14, 2001, and filed reply briefs on December 21, 2001.

## III. Relevant State and Federal Proceedings

### Relevant Commission Decisions

#### *SWBT Mega-Arbitrations*

The FTA became effective in February 1996. Soon thereafter, several proceedings—collectively referred to as the SWBT Mega-Arbitrations—were initiated and consolidated for the purpose of arbitrating the first interconnection agreements in Texas under the new federal statute. In November 1996, the Commission issued the Phase-I Mega-Arbitration Award in Docket No.

---

[5] Order No. 2, Revising Procedural Schedule (Sept. 14, 2001), and Order No. 3, Granting Withdrawal of Motion to Dismiss Petition for Arbitration (Sept. 20, 2001); Docket No. 23721, Order Dismissing Proceeding (Sept. 20, 2001).

[6] FTA § 252(b)(1); P.U.C. Proc. R. 22.305(a).

[7] Prehearing Conference Tr. at 19-21 (Nov. 21, 2001).

16189,[8] establishing interim rates for UNEs and an aggregate avoided-cost discount of 21.6% applicable to retail telecommunications services sold to reselling telecommunications carriers. The final Phase-II Mega-Arbitration Award in Docket No. 16189,[9] issued in December 1997, established permanent rates for UNEs and resolved other pricing issues.[10]

## Relevant Federal Communications Commission Decisions

***First Report and Order***

In its First Report and Order,[11] the Federal Communications Commission (FCC) promulgated the local competition rules implementing FTA §§ 251 and 252. Pursuant to FTA § 251(c)(3), which requires the ILEC to provide any requesting telecommunications carrier with nondiscriminatory access to network elements on an unbundled basis, the FCC specified several unbundled network elements (UNEs) that ILECs must offer to CLECs. In particular, the First Report and Order decreed that an ILEC's operations support system (OSS) must be unbundled because it is a "network element."[12] Moreover, in that Order the FCC held that nondiscriminatory access to the functions of OSS "could be viewed as a 'term or condition' of unbundling other network elements under section 251(c)(3), or resale under section 251(c)(4)."[13] Accordingly, the FCC concluded that OSS "functions are subject to the nondiscriminatory access duty imposed by section 251(c)(3), and the duty imposed by section 251(c)(4) to provide resale

---

[8] *Petition of MFS Communications Company, Inc. for Arbitration of Pricing of Unbundled Loops Agreement Between MFS Communications Company, Inc. and Southwestern Bell Telephone Company,* Docket No. 16189, *et al,* Award (Nov. 8, 1996) (Phase-I Mega-Arbitration Award).

[9] *Petition of MFS Communications Company, Inc. for Arbitration of Pricing of Unbundled Loops Agreement Between MFS Communications Company, Inc. and Southwestern Bell Telephone Company,* Docket No. 16189, *et al,* Award (Dec. 19, 1997) (Phase-II Mega-Arbitration Award).

[10] *Id.*, Appendices B and C.

[11] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, and Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers,* First Report and Order, CC Docket No. 96-98, CC Docket No. 95-185, FCC 96-325 (rel. Aug. 8, 1996) (First Report and Order).

[12] *Id.* at ¶ 516 (Aug. 8, 1996). *See also* ¶ ¶ 258-260, 516-518, 522, and 525.

[13] *Id.* at ¶ 517.

services under just, reasonable, and nondiscriminatory terms and conditions."[14] The FCC also determined that prices for interconnection and unbundled elements would be based on Total Element Long Run Incremental Cost (TELRIC).[15]

***UNE Remand Order***

In its UNE Remand Order,[16] the FCC reaffirmed its earlier determination that the five functions of OSS that ILECs must make available to competitors on an unbundled basis are pre-ordering, ordering, provisioning, repair and maintenance, and billing.[17] Additionally, the FCC stated as follows:

> OSS is a precondition to accessing other unbundled network elements and resold services because competitors must utilize the incumbent LEC's OSS to order all network elements and resold services. Thus, the success of local competition depends on the availability of access to the incumbent LEC's OSS. Without unbundled access to the incumbent LEC's OSS, competitors would not be able to provide their customers comparable, competitive service, and hence would have to operate at a material disadvantage.[18]

## IV. Discussion of DPL Issues

This proceeding addresses the issues in the final DPL filed by the parties on November 27, 2001, as set forth in detail below.

### DPL ISSUE NO. 1.

***Whether the functions provided by SWBT to 1-800-4-A-Phone in processing service orders via an electronic gateway are resold services or unbundled network elements.***

---

[14] *Id.*

[15] *Id.* at ¶ 672.

[16] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, and Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers,* Third Report and Order, CC Docket No. 96-98, CC Docket No. 95-185, FCC 96-325 (rel. Nov. 5, 1999) (UNE Remand Order).

[17] *Id.* at ¶ ¶ 425-426.

[18] *Id.* at ¶ 434.

***AccuTel's Position***

AccuTel's position was that the functions provided by SWBT in processing service orders via an electronic gateway are unbundled network elements.[19]

***SWBT's Position***

SWBT stated that it processes invoice orders via various electronic gateways as both resold services and UNEs. SWBT reported that the prices AccuTel receives depend on whether AccuTel submits a resold service order or a UNE service order.[20] SWBT argued that "...while the OSS functions are required to be unbundled, they are not and should not be priced as UNEs in the resale context."[21] SWBT additionally contended that OSS is unlike other UNEs, in that the latter are actual products and services used in the provisioning of telecommunications services, whereas it is the OSS functions that are necessary for and auxiliary to the provisioning of all telecommunications services no matter how they are provided.[22]

***Arbitrators' Decision***

*The Arbitrators find that the functions provided by SWBT in processing electronic service orders are properly viewed as UNEs. In its First Report and Order, the FCC found that "operations support systems and the information they contain fall squarely within the definition of 'network element' and must be unbundled upon request under section 251(c)(3)...."[23] The FCC further found that nondiscriminatory access to OSS functions can be viewed in at least three ways:*

> First, operations support systems themselves can be characterized as "databases" or "facilit[ies]...used in the provision of a telecommunications service," and the functions performed by such systems can be characterized as "features, functions, and capabilities that are provided by means of such facilit[ies]." Second, the information contained in, and processed by operations support systems can be classified as "information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service." Third,

---

[19] SWBT's Amended Decision Point List (Amended DPL) at 3 (Nov. 27, 2001).

[20] *Id.*

[21] SWBT's Initial Brief at 4-5.

[22] *Id.* at 5.

[23] First Report and Order at ¶ 516.

nondiscriminatory access to the functions of operations support systems, which would include access to the information they contain, could be viewed as a "term or condition" of unbundling other network elements under section 251(c)(3), or resale under 251(c)(4).[24]

*The Arbitrators find no convincing evidence that the OSS functions in question should not be considered UNEs, even when those functions (and facilities) are used to place orders for resold services. See the Arbitrators' decision on DPL Issue 7 for further discussion.*

## DPL ISSUE NO. 2

***Whether the rate for the OSS functions SWBT provides to 1-800-4-A-Phone to process its service orders should be based on an avoided cost discount, on TELRIC, or on some other pricing standard.***

### *AccuTel's Position*

AccuTel stated that the rate should be based on TELRIC.[25] AccuTel noted that the TELRIC pricing standard for UNEs was established by the FCC in its First Report and Order, and was the standard followed by the Commission in setting UNE rates for the Texas 271 Agreement (T2A).[26]

### *SWBT's Position*

SWBT stated that it does not charge CLECs for connectivity or access to OSS functions at this time.[27] With respect to charges for processing service orders, SWBT observed that the prices AccuTel receives are dependent upon whether AccuTel submits a resold service order or a UNE service order.[28] SWBT argued that "while the OSS functions are required to be unbundled, they are not and should not be priced as UNEs in the resale context."[29] SWBT argued that,

---

[24] *Id.* at ¶ 517.

[25] Amended DPL at 3.

[26] Direct Testimony of Candice Clark, AccuTel Ex. 1, at 6 (Oct. 31, 2001).

[27] Amended DPL at 3. SWBT's contract calls for AccuTel to pay $3,200 per month for access to SWBT's OSS (SWBT Ex. 5, Joint Application of SWBT and AccuTel for Approval of Amendment to Interconnection Agreement at 5); however, this payment is waived at this time in accordance with the Ameritech merger agreement (Tr. at 99).

[28] *Id.*

[29] SWBT's Initial Brief at 4-5.

pursuant to FTA §§ 251(c)(4) and 252(d)(3), the service order charge assessed AccuTel for placing an order for a service for resale (*i.e.*, resold service) is properly calculated by applying the avoided-cost discount to the service order charge faced by a retail customer who orders service from SWBT.[30]

***Arbitrators' Decision***

*The Arbitrators find that OSS functions provided by SWBT to AccuTel should be based on TELRIC. As noted by AccuTel, the FCC and this Commission have adopted the TELRIC pricing standard for UNEs. The Arbitrators find no convincing reason to depart from that standard in the case of OSS functions. The Arbitrators further note that the FCC's following statement, from the First Report and Order, also suggests that prices for OSS functions should be based on TELRIC, regardless of whether the OSS function is used to place an order for a resold service or for a UNE:*

> In all cases, however, we conclude that in order to comply fully with section 251(c)(3) an incumbent LEC must provide, upon request, nondiscriminatory access to operations systems functions for pre-ordering, ordering, provisioning, maintenance and repair, and billing of unbundled elements under section 251(c)(3) and 251(c)(4).[31]

*In this statement, the first reference to FTA § 251(c)(3), which requires nondiscriminatory rates for access to OSS functions, applies equally to the purchase of UNEs under § 251(c)(3) and to the purchase of resold services under § 251(c)(4).*

*See the Arbitrators' decision on DPL Issue 7 for more discussion.*

## DPL ISSUE NO. 3

***Whether the services in Southwestern Bell's General Exchange Tariff Section 27, Sheets 1-5 correspond to the functions provided by SWBT to 1-800-4-A-Phone in processing service orders via an electronic gateway.***

---

[30] Rebuttal Testimony of Roman A. Smith, SWBT Ex. 4 at 4-5.

[31] First Report and Order at ¶ 525.

***AccuTel's Position***

It was AccuTel's position that the services in SWBT's tariff do not correspond to the functions provided by SWBT in processing service orders via an electronic gateway.[32]

***SWBT's Position***

SWBT contended that the services outlined in SWBT's tariff correspond to the functions provided by SWBT in processing service orders via an electronic gateway. SWBT reported that retail service orders can be processed through its Easy Access Sales Environment (EASE) and also through the LSR Exchange (LEX) and the Electronic Data Interchange (EDI). SWBT asserted that resale services are based upon retail services available in the tariff. In this instance, SWBT maintained, the avoided cost for electronic orders has been applied to the retail service order charge.[33]

***Arbitrators' Decision***

*The Arbitrators note that the specified pages in SWBT's General Exchange Tariff actually define and set forth non-recurring service charges applicable to an SWBT retail customer.[34] The Arbitrators find that the service ordering charge contained in those pages does not correspond to the functions provided by SWBT in processing service orders via an electronic gateway. See the Arbitrators' decision on DPL Issue 7.*

**DPL ISSUE NO. 4.**

***Whether SWBT's "Electronic Service Order-LEX, EDI, EASE-Rate Analysis" accurately reflects the current costs of electronic service order processing and develops the rates for these functions in a way consistent with federal law and rules.***

***AccuTel's Position***

AccuTel argued that SWBT's "Electronic Service Order-LEX, EDI, EASE-Rate Analysis" did not accurately reflect the current costs of electronic service order processing and

---

[32] Amended DPL at 3.

[33] *Id.*

[34] These tariff sheets show the trip charge and the central office access charge, in addition to the service ordering charge.

did not develop the rates for these functions in a way that is consistent with federal law and rules.[35]

***SWBT's Position***

SWBT maintained that, consistent with the FCC's First Report and Order, the rate analysis in the "Electronic Service Order-LEX, EDI, Ease-Rate Analysis" was performed using the avoided cost methodology in order to develop a resale rate based upon the retail costs that would be avoided if the service was provided on a wholesale basis. SWBT argued that the FCC recognized this as an appropriate costing methodology for resold services.[36]

***Arbitrators' Decision***

*The Arbitrators find that SWBT's "Electronic Service Order-LEX, EDI, EASE-Rate Analysis" is not appropriate for developing rates for the electronic processing of service orders. As indicated in the Arbitrators' decisions on DPL Issues 1 and 2, and as discussed more fully under DPL Issue 7, OSS functions are UNEs; accordingly, their prices should be based on TELRIC. Unlike a TELRIC methodology, SWBT's "Rate Analysis" does not directly calculate the forward-looking costs of processing an electronic order; each rate produced by the "Rate Analysis" is derived by subtracting avoided costs from a retail rate. This approach does not yield TELRIC-based rates.*

## DPL ISSUE NO. 5.

***SWBT: Whether the avoided cost discount adopted in the MegaArb, and incorporated in the AccuTel/SWBT Resale Agreement should be altered or changed in this proceeding.***

***AccuTel's Position***

AccuTel stated that it is not requesting this relief and does not agree that this is a pending issue.

---

[35] Amended DPL at 4; Rebuttal Testimony (Redacted) of Candice Clark, AccuTel Ex. 2 at 4-5 (Nov. 13, 2001).

[36] Amended DPL at 4.

***SWBT's Position***

SWBT urged the Commission not to change the avoided cost discount adopted in the MegaArb. SWBT argued that the Commission previously adopted and approved the 21.6% avoided cost discount for eligible retail-based services for resale carriers in Texas. According to SWBT, the FCC Order does not permit a CLEC to have some resale prices based upon a service-specific discount while other prices are based on an aggregate discount for all services. SWBT asserted that AccuTel agreed in November of 1999 to abide by the terms, conditions, and prices of a five (5) year contract.[37]

***Arbitrators' Decision***

*Based upon the record, this DPL Issue does not appear to reflect relief requested by any party; therefore, this is not a pending issue and will not be addressed.*

**DPL ISSUE NO. 6.**

***SWBT: Whether the Commission has the authority to insert or change language to an existing interconnection agreement between SWBT and AccuTel by ordering an amendment.***

***AccuTel's Position***

AccuTel asserted that it is not requesting this relief and does not agree that this is a pending issue.[38]

***SWBT's Position***

SWBT noted that the current agreement in dispute has a term of five (5) years. SWBT and AccuTel entered into this Resale Agreement on November 10, 1999. This agreement was completely negotiated, and signed by this Commission on January 12, 2000. In SWBT's view, the Commission has played its role by approving this Agreement on January 12, 2000.[39]

---

[37] *Id.*

[38] *Id.*

[39] *Id.*

***Arbitrators' Decision***

*During the hearing on the merits, counsel for SWBT argued that the Arbitration Award issued in Docket No. 24442 should be relied upon in this proceeding to limit the authority of the Commission.*[40] *SWBT argued that application of the Award in Docket No. 24442 would result in prohibiting the Commission's modification of the pricing terms of the existing interconnection agreement between SWBT and AccuTel. In addition, SWBT provided testimony and briefing on this issue and concluded that the Commission has no authority to amend the contract during the term of the contract to add a price that is already contained in that contract. The basis for this line of reasoning appears to be that the charge for manual service orders applies to electronic orders, notwithstanding the initiation of negotiations on the specific issue of electronic ordering that gave rise to this compulsory arbitration.*

*For the reasons set forth below, the Arbitrators do not agree with the analysis of SWBT on this issue. Specifically, this situation can be distinguished from Docket No. 24442 in that this term in the agreement was opened up by a mutual agreement to arbitrate. The Arbitrators find that the Commission is fully vested with the authority to determine the open issue of the appropriate charge for electronic ordering of new/suspended customers through this arbitration.*

*In Docket No. 24442, a post-interconnection dispute proceeding under P.U.C. PROC. R. 22.326, the parties submitted a specific question of contract interpretation to the Arbitrators as a threshold issue. In the present case, AccuTel and SWBT have engaged in negotiations with regard to an amendment to the existing interconnection agreement.*[41] *This compulsory arbitration emerged to resolve the open issue that the parties' negotiations failed to resolve. The context, issue, and purpose of this proceeding bear no resemblance to those in Docket No. 24442. The outcome of this proceeding is not based upon the construction or interpretation of existing contract language, but is to be based upon the various alternative amendments to the contract identified in the evidence, briefs, and applicable precedent.*

*The argument advanced by SWBT directly contradicts applicable federal law by extinguishing the ability of the Commission to arbitrate open issues. By engaging in the*

---

[40] Tr. at 42 (Nov. 28, 2001); *Complaint and Request for Post-Interconnection Dispute Resolution Regarding Reclassification of Southwestern Bell Telephone Company's Deaveraged UNE Loop Rates*, Docket No. 24442, Award (Nov. 16, 2001).

*negotiation process but failing to arrive at an agreement, SWBT and AccuTel triggered the authority of the Commission to resolve the open issue through compulsory arbitration. The procedural history of this arbitration reflects that discussions were held on the record to determine whether the central issue in this case (DPL No. 7) should be heard under the complaint resolution procedures or should be subject to arbitration. As noted in the procedural history, the parties agreed to this compulsory arbitration proceeding and did not wish to present briefs on threshold jurisdictional issues.*[42] *SWBT now seeks to escape the Commission's authority to arbitrate the open issue through rearguing a threshold jurisdictional issue that SWBT earlier abandoned when it agreed to proceed with this matter as an arbitration.*[43] *The Arbitrators decline to follow SWBT's circular procedural maneuvering that would require the dismissal of this proceeding for lack of jurisdiction.*

## DPL ISSUE NO. 7.

***What is the appropriate charge for SWBT's electronic processing of new resale service orders?***

***AccuTel's Position***

Initially, AccuTel argued that there is no substantial difference between electronic processing of conversion orders and electronic processing of orders for new or suspended customers; therefore, the $5.00 charge for processing conversion orders should apply to the electronic processing of new and suspended customers.[44] Subsequently, AccuTel argued that the $2.58 charge for an electronic UNE service order charge for new simple service should apply because, like other UNEs, unbundled OSS must be priced at TELTRIC. AccuTel asserted that the TELRIC pricing standard was established by the FCC in its First Report and Order ¶¶ 672-707, and is the principle followed by the Commission in setting UNE rates in the Texas § 271 Agreement (T2A).[45]

---

[41] Prehearing Conference Tr. at 6-7 (Sept. 10, 2001).

[42] *Id.* at 6-15.

[43] *Id.* at 14-15.

[44] Petition for Arbitration at 4-5 (Aug. 22, 2001).

[45] Direct Testimony of Candice Clark, AccuTel Ex. 1 at 5-6.

***SWBT's Position***

SWBT stated that, currently, the appropriate charge for SWBT's electronic processing of new resale service orders is $14.96. This is derived by subtracting from the retail tariffed rate of $22.00 the appropriate avoided cost discount of 32%, which provides a cost of $14.96.[46]

SWBT maintained that "while the [OSS] functions are required to be unbundled, they are not and should not be priced as UNEs in the resale context. The pricing for the submission of orders depends upon the type of service that the CLEC is ordering, *i.e.*, resale or UNEs."[47] Moreover, SWBT asserted that "The Commission considered the electronic processing of orders at the time that the avoided cost discount was established, and therefore the submission of electronic service orders is within and covered by the avoided cost discount."[48]

***Arbitrators' Decision***

*The Arbitrators agree with AccuTel that $2.58 is the appropriate charge for the processing of electronic orders of resold services for new and suspended customers.*[49] *Therefore, the current interconnection agreement between AccuTel and SWBT should be amended to provide a charge of $2.58 for the processing of electronic service orders for new and suspended customers.*

*AccuTel has not disputed that the charge for the manual processing of service orders for new and disconnected customers paid by AccuTel under its current resale agreement with SWBT is $14.96. SWBT insisted that this manual processing order charge should also apply to orders processed electronically. The Arbitrators find that SWBT's argument lacks foundation and cannot be supported under federal or Commission precedent.*

---

[46] Amended DPL at 5.

[47] SWBT Initial Brief at 4-5. As evidence that the Commission considered the electronic processing of orders in establishing its avoided-cost discount, SWBT cited paragraph 55 of the original Mega-Arbitration, and said that the FCC developed the underlying reasoning in the First Report and Order, paragraph 55.

[48] *Id.* at 9. On page 5 of his direct testimony, SWBT witness Buehner observed that "the record evidence does not mention electronic service orders specifically, but that is certainly one way that almost all of the service center labor expenses would be avoided."

[49] The reconnection process and existing charges for AccuTel's suspended (referred to as restoral) customers are outlined in the Direct Testimony of Roman A. Smith, SWBT Ex. 2 at 5-8.

*SWBT argued that "the pricing for the submission of orders depends upon the pricing for the type of service that the CLEC is ordering, i.e., resale or UNE's."*[50] *However, SWBT's argument does not include relevant authority to support this proposition. SWBT presented various justifications for applying an avoided cost methodology to the electronic service orders, including citations to the provisions of the FTA, the First Report and Order, and the Commission's Mega-Arbitration that discuss avoided costs for retail telecommunications services.*[51] *A critical flaw in SWBT's analysis was that it treated electronic service ordering as a telecommunications service.*[52] *On cross-examination, SWBT conceded that electronic service ordering is not a telecommunications service.*[53] *SWBT offered no authority for treating the pricing of electronic service ordering as if it were a telecommunications service, a serious omission given that this pricing strategy is the centerpiece of the SWBT position.*

*SWBT conceded that the Federal Communications Commission (FCC) has not taken the position urged by SWBT.*[54] *In his rebuttal testimony, SWBT witness Smith asserted that Section 251(c)(4)(A) of the FTA "...demonstrates that it is reasonable to price the processing of the service order at a resale rate."*[55] *The referenced provision of the FTA requires the ILEC to offer for resale at wholesale prices any telecommunications service that the carrier provides at retail to subscribers. However, the provision of the FTA relied upon by SWBT for the pricing does not apply to electronic ordering. As conceded by SWBT, electronic service ordering is not a telecommunications service. Further, SWBT witness Buehner's direct testimony pointed out that "[u]nfortunately, there is no retail rate for electronic service orders as no retail customer of SWBT submits its service orders to SWBT on an electronic basis."*[56]

*In an effort to describe the differences in SWBT's processes involved with conversion orders and those required for new customers, SWBT presented testimony to suggest that the*

---

[50] SWBT Initial Brief at 5.

[51] Direct Testimony of John H. Buehner, SWBT Ex. 1 at 3.

[52] *Id.*

[53] Tr. at 68 (Nov. 28, 2001).

[54] Tr. at 102-3 (Nov. 28, 2001).

[55] Rebuttal Testimony of Roman A. Smith, SWBT Ex. 4 at 5.

[56] SWBT Ex. 1 at 7.